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In the Supreme Court of the United States

October Term, 1991

ERWIN RAUTENBERG, et al.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

and

UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a Court of the United States, consistent with due process of law, turn a protective order into a secret decree, denying the party required to obey it full access to it and forbidding that party from disclosing its terms or existence to others?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, AIR-SEA FORWARDERS, its president, ERWIN RAUTENBERG, and its attorney, MATTHEW STEINBERG, respectfully pray that a writ

of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, filed on April 1, 1991, denying Petitioner's petition for writ of mandamus. Petitioner's petition for rehearing from that order was denied on April 29, 1991.

ORDERS BELOW

The June 1, 1991 order of the United States Court of Appeals for the Ninth Circuit conditionally granting the writ of mandamus is attached hereto as Appendix A. The August 21, 1990 order of the District Court upholding the protective order as necessary to the protection of the state secrets privilege is attached hereto as Appendix B. The Ninth Circuit's February 13, 1991 order denying Air-Sea's supplementary writ petition is attached hereto as Appendix C. The Ninth Circuit's April 1, 1991 order granting reconsideration and again denying the writ is attached hereto as Appendix D, and the order denying Petitioners' petition for rehearing on April 29, 1991 is attached as Appendix E.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing on April 29, 1991. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:
"Congress shall make no law . . . abridging the freedom of speech . . . ."

United States Constitution, Amendment V:
"No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

United States Constitution, Amendment VII:
"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ."

STATEMENT OF THE CASE

Petitioner Air-Sea Forwarders Inc. ("Air-Sea") was an international freight forwarder and customs house broker for Air Asia Co., Ltd. and its predecessors ("Air Asia") from 1950 until July 27, 1981. Until 1975, Air Asia was "owned secretly by the Central Intelligence Agency" and operated on Taiwan primarily as an "aircraft repair and maintenance facility" for Air America, "the CIA's secret Southeast Asian air force . . . ." In 1975, Air Asia was acquired by E-Systems Inc. *Air-Sea Forwarders,*

Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 179-180 (9th Cir. 1989).

On August 12, 1981, Air-Sea filed an action against Air Asia asserting that the termination was in violation of Air Asia's contract obligations. 880 F.2d 176, 180.

E-Systems responded to Air-Sea's pretrial discovery requests by moving for a protective order to restrict Air-Sea's access to confidential business information. In an *in camera, ex parte* hearing, the United States then presented classified declarations in support of the issuance of a protective order (Government Response to Petition for Mandamus, hereinafter *Response*, p. 3).

The District Court issued this protective order on November 6, 1984. This order, according to the Government, "directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments" or as to "whether a confidential relationship existed between the United States and certain specified private parties" (Response, p. 5).

Further, the court denied the Air-Sea full access to the order itself. Petitioners Rautenberg, Air-Sea president, and his counsel Matthew Steinberg were allowed to "examine" the protective order, but not to have a copy of it. In addition, the court ordered them not to disclose to others the terms of the order or the

participation of the government in the case (Response, p. 5).

Air-Sea attempted unsuccessfully to have the order vacated on March 18, 1986 (Response, p. 7). The court amended the order on November 21, 1985, and it is currently operative in its amended form (Response, p. 10).

At the conclusion of the trial, the jury awarded Air-Sea $216,151.50 in compensatory damages for breach of contract, and $6,000,000 in punitive damages for the bad faith denial of the existence of the contract. The district court then granted Air Asia's motion for judgment notwithstanding the verdict as to the bad faith claim, and a new trial as to the breach of contract claim. 880 F.2d 176, 181. On appeal, the Ninth Circuit reversed the judgment j.n.o.v., and affirmed the alternative grant of a new trial as to all issues. 880 F.2d 176, 181-90.

In the course of its opinion, the Ninth Circuit noted that "the district court was in communication with government lawyers concerning the role of classified information," and that "the district court entered a supplemental protective order regulating the admission of certain classified evidence . . . ." 880 F.2d at 192.

In preparation for the new trial on remand, Air-Sea again moved to vacate the order, and the motion was

again denied, on November 6, 1989 (the transcript of the hearing was attached to Air-Sea's Emergency Petition for Writ of Mandamus, hereinafter Petition, as Exhibit "A").

After unsuccessful efforts to negotiate mutually acceptable modifications of the order (Declaration of Matthew Steinberg, attached to Petition, para. 15) Petitioners filed their emergency petition for mandamus asking the Ninth Circuit to vacate the order on April 6, 1990.

On June 11, 1990, the Ninth Circuit issued an order granting the writ petition unless the government filed a certification in support of its state secrets claim with the district court, in which case the district court was to rule on the claim (App. A).

On June 29, 1990, the government submitted the Declaration of

asserting the state's secret privilege (Government Response to Supplemental Petition for Writ of Mandamus, hereinafter "Supplemental Response", p. 11).

The declaration recited that Air Asia had been a proprietary of the CIA, but that the CIA had sold all outstanding shares to E-Systems in 1975 and that "[s]ince that time, CIA has had no relationship with Air Asia."

then invoked the privilege as to

'attached

to Supplemental Response).

On August 21, 1990, the district court issued its order upholding the government's claim of the state secrets privilege, and finding the protective order no more restrictive than necessary to protect that privilege (App. B).

On October 11, 1990, Petitioners filed their Supplemental Petition for Writ of Mandamus, again asking the Ninth Circuit to vacate, or at least to modify, the protective order.

On February 13, 1991, the Ninth Circuit denied the petition (App. C). By order filed on April 1, 1991, the Ninth Circuit granted Petitioners' motion for reconsideration, but again denied the petition (App. D). On April 29, 1991, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (App. E).

REASONS FOR GRANTING REVIEW

INTRODUCTION

The protective order challenged here is problematic in many ways, but most strikingly in that it is, for

Petitioner Erwin Rautenberg, a kind of secret law: a standard by which he must regulate his life under threat of punishment for contempt, but to which he is denied full access, and which he cannot disclose to others. In what follows, Petitioners show how these limitations on access to, and disclosure of, the order violate Petitioners' fundamental Constitutional rights, and require review by this Court.

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER COURTS CAN, CONSISTENT WITH DUE PROCESS OF LAW, DENY LITIGANTS FULL ACCESS TO ORDERS WHICH THOSE LITIGANTS MUST OBEY UNDER THREAT OF PUNISHMENT FOR CONTEMPT.

The most disturbing aspect of the protective order is that it denies those who must obey it full access to it.

A party must have notice of a court order in order to be held to its terms, but, having learned of the existence of an order, the party has the responsibility of making appropriate efforts "to ascertain the terms of any order entered against" him. *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981).

Here, Petitioners are threatened with contempt for violating an order twelve or more paragraphs in length (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 11), of which they cannot have a copy, and of which neither Petitioner Rautenberg nor his attorney is allowed "to conduct a free, careful, deliberative and unsupervised" review (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 8). At one and the same time, then, the order threatens them with penalties for violating its provisions, and deprives them of the ability to "to ascertain [its] terms" with certainty. See *International Longshoreman Association v. Philadelphia Mar. T.A*, 389 U.S. 64, 76, 88 S.Ct. 201, 208 (1967); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

A comparison of the references made to the order in the pleadings shows that the problem of uncertainty about its scope and content is far from theoretical.

Mr. Rautenberg could remember only that he was not to talk about

, and that

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[1]Mr. Rautenberg has no knowledge of any classified information, and never had any access to such information (Declaration of Erwin Rautenberg attached to Petition, paras. 15, 18). His firm, Air-Sea Forwarders, has never handled any classified or secret shipments, and, on the

there was something about the destination of shipments (Declaration of Erwin Rautenberg attached to Petition, para. 12).

Rautenberg's attorney, Steinberg, on the other hand, remembered the order to preclude disclosure of "confidential business intercourse" between and foreign governments (Declaration of Matthew Steinberg attached to Supplemental Petition, para. 10).

The Government, in its allusions to the content of the order, offered a description which, even allowing for its purposeful vagueness, suggests that the actual order may differ to an uncertain extent from either Rautenberg's or Steinberg's recollections:

> "[The order] directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments; it also placed similar limitations on disclosure of information pertaining to whether a confidential relationship existed between the United States and certain specified private parties."
>
> Response, pp. 4-5.

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contrary, has always treated all shipments in the completely open manner prescribed by law for customs brokers and freight forwarders ((Supplemental Declaration of Erwin Rautenberg attached to Supplemental Petition, para. 3).

The nature of the dilemma into which this secret decree places Rautenberg and his attorney becomes clearer when their inability to know the content of the order with certainty is put in the context the government's warnings that even *inadvertent* violations of it may be punished with contempt (Exhibit D to Supplemental Petition, p. 7). It is the Kafkaesque dilemma of a person who is haunted by the fear that he may at any moment incur guilt for violating a rule he cannot remember.

The due process clause forbids our government from placing anyone in such a dilemma:

> "As a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes."

United States v. Gilbert, 813 F.2d 1523 at 1530 (9th Cir. 1987).

A criminal statute must therefore be declared void if it is so vague that,

> "men of common intelligence must necessarily guess at its meaning and differ as to its application."

Connally v. General Construction Co., 269 U.S. at 391, *supra*.

The requirement of "fair warning" in a criminal statute has been described as the "first essential of due process," *United States v. Lane*, 759 F.2d 618 at 622, but it is founded on an even broader and more basic doctrine, which this Court first enunciated and applied in a contempt case:

> "The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension." *International Longshoreman Association v. Philadelphia Mar. T.A*, 389 U.S. 64 at 76, 88 S.Ct. 201 at 208, *supra*.

In striking down a court order it found to be insufficiently specific in its terms, this Court warned in *International Longshoreman* that,

> "The judicial contempt power is a potent weapon. When it is founded upon a decree to vague to be understood, it can be a deadly one."
>
> 389 U.S. at 76, 88 S.Ct. at 208.

Here, Rautenberg and his attorney must "speculate" about the content of a decree, "guess at its meaning and differ as to its application," not because of its inherent vagueness, but because the court has, at the government's

request, placed severe restrictions on the ability of those who must live under it to know what it says.

The result is the same. Here, as in the case of an inherently vague order[2], the vice is that people must act at their peril though denied any certain knowledge of the actions they must avoid. Here, Rautenberg lives under the threat that he will incur the punishment of contempt for an unintentional violation of an order the text of which is not immediately available to him, so that he cannot know its scope and content with certainty at the moments when he most needs its guidance.

This Court should grant review in order to explore the special problems raised by this novel form of the familiar vice of vagueness, in which an order is rendered "to vague to be understood," not by the inherent ambiguity of its provisions, but by denial of full access to the content of those provisions.

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[2]The protective order here appears to suffer from this vice as well, but the limits on access to it preclude the careful study required to determine this with certainty.

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO DETERMINE WHETHER A PRIOR RESTRAINT FORBIDDING LITIGANTS FROM MAKING PUBLIC THE TERMS OF THE ORDERS IMPOSED UPON THEM CAN BE JUSTIFIED BY A CLAIM OF THE STATE SECRETS PRIVILEGE SUCH AS THAT MADE HERE.

The regime of secrecy which cloaks the order is completed by a provision which forbids Petitioners from disclosing to others what they are able to remember of the terms of the order, as well as its existence, and even the fact that the government intervened in this litigation to obtain it.

This provision presents the question of whether, and under what circumstances, the courts of the United States can join with the government to keep orders limiting the liberty of private parties from public view, forbidding those whose rights are restricted by such orders from public disclosure of them.

This Court held, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), that a protective order which is supported by good cause and extends *only* to information gained from discovery is consistent with the First Amendment.

The provision challenged here raises, for one thing, a question not dealt with in *Rhinehart*: the validity under the First Amendment of an order which prohibits public disclosure of information *not* gained through discovery, specifically the disclosure of the protective order itself.

The district court in the recent case of *Doe v. State of Florida Judicial Qualifications Commission*, 748 F.Supp. 1520 (S.D.Fla. 1990), held that, at least where the information governed by the protective order was "about a matter of public significance", this Court's decisions in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, and *Butterworth v. Smith*, 110 S.Ct. 1376 (1990) should govern, and that the order could not be valid "absent a need to further a state interest of the highest order."

In *Butterworth* the issue was the constitutionality of a Florida statute prohibiting a grand jury witness from ever revealing the content of his testimony in public. This Court followed *Smith* to hold that the statute could not constitutionally be applied to prohibit disclosure of the testimony after the expiration of term of the grand jury which heard it. In doing so, this Court explicitly distinguished *Rhinehart* on the basis that in *Butterworth* the information was gained by means *independent* of the discovery process. 110 S.Ct. 1376, 1381.

Like the statute in *Butterworth*, the provision of the protective order prohibiting disclosure of the order suppresses information "of public significance" which was gained by means independent of the discovery process.

The existence of the protective order *is* a matter of public interest. It discloses a governmental effort, carried out with the aid of the district court, to suppress information about matters which have already gained considerable public attention:

. It is also a matter of public interest precisely because the public in a democracy should know about the restrictions which courts may place upon the rights of private parties in the name of national security.

Further, Petitioners learned of the order, not as the fruit of its own *discovery* efforts, but because it was *imposed* upon them, as the result of a hearing in which they were not allowed to participate and of which they had no notice.

Applying the *Butterworth* principle, therefore, the prohibition on disclosure should not be upheld "absent a need to further a state interest of the highest order."

Because it prohibits public disclosure of information of public importance, the provision suppressing of communication about the order also falls within this ambit of another body of doctrine developed by this Court: that which relates to prior restraints on the freedom of speech. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971).

In *Levine v. U.S. District Court*, 764 F.2d 590 (9th Cir. 1985) the Ninth Circuit held that a protective order prohibiting participants in a judicial proceeding from making public disclosure of that proceeding to be a prior restraint. It held, therefore, that the order could be valid only if (1) the disclosures it prevented posed "either a clear and present danger or a serious and imminent threat to a protected competing interest," (2) the order was "narrowly drawn," and (3) "less restrictive alternatives were not available." 764 F.2d 590 at 595.

The prohibition on public disclosure of the order here satisfies neither this Court's *Smith-Butterworth* test nor that distilled from this Court's prior restraint decisions in *Levine*.

The "state interest of the highest order" which suppression of information about the order *purports* to serve is that in national security interest, as asserted in the

See *Reynold v. United States*, 192 F.2d 987 (3d Cir. 1951). The state secret privilege claim would also form the basis for a claim of clear and present danger or "serious and imminent threat to a protected competing interest" under *Levine*.

The order here reaches beyond the familiar realm of the state secrets privilege. The state secrets privilege is an *evidentiary* privilege. See *Zuckerbraun v. General Dynamics Corp.*, 755 F.Supp. 1134, 1137 (D.Conn. 1990). It is directed to limiting discovery, keeping secret matters out of evidence, and, at most, limiting the use of discovered material. Here, however, it purports to support an order which prohibits the out-of-court disclosure of information *not* learned through discovery: the existence and content of the protective order itself.

Assuming such an expansive use of the state secrets privilege is permissible, the national security needs which lie behind the privilege are not served by the provision forbidding Petitioners from making the order public here, because, the existence of the order and the context from

which it arose have already been "made public through official disclosures." *Hudson River Sloop Clearwater v. Dept. of the Navy*, 891 F.2d 414 at 421 (2d Cir. 1989).

Thus, the intervention of the government and the existence of the protective order were disclosed in the published opinion of the Ninth Circuit Court of Appeal in this case. 880 F.2d 176, 192.

So too, the content of the order (to the extent that appellate counsel can reconstruct it from his own recollections and the suggestions in the pleadings) reveals no more about government intentions and actions than is already obvious from the Ninth Circuit opinion and other official documents:

The government has an interest in maintaining the confidentiality about Air-Asia

In the words of

The farcical nature of this concern is made all the clearer by the fact that the relationships claimed to be secret here have been the subject of newspaper articles, popular books, and even motion pictures.

It follows that the other *Levine* criteria could not have been satisfied either. The order, far from being "narrowly drawn," prohibits speech with regard to the order as broadly as possible, and, like the statute in *Butterworth*, forever.

So too, there were "less restrictive alternatives" available to protect the asserted national security interest in keeping aspects of the relationship between the government and an order protecting only the *confidential* aspects of that relationship, and not the aspects of it which are already publicly known. Such an order would have been narrower in many respects, and would not have required a provision rendering *itself* secret.

While courts do not generally balance interests in adjudicating claims of the state secrets privilege, a consideration of the interests favoring disclosure "is relevant in determining how deeply the court should probe in satisfying itself that the privilege is properly invoked." *National Lawyer's Guild v. Attorney General*, 96 F.R.D. 390, 400 (S.D.N.Y. 1982).

It takes little probing to show that the claim of state secrets privilege made here offers no real basis for making the order secret. On the other side, there are not only fundamental free speech rights, but vital private interests as well. The secrecy order restricts Rautenberg's ability to protect his own interests in this case, and, because of its apparently "eternal duration" and unlimited scope, in related litigation as well. It restricts not only his ability to present relevant evidence, but also his ability to communicate fully with counsel and potential witnesses (Petition, pp. 14-15, 38-42, Supplemental Petition, pp. 42-47).

For example, the prohibition on disclosure of the existence or content of the order makes it entirely impossible for Rautenberg to prosecute his malpractice action against the attorneys who advised him to sign an acknowledgement of it (Petition, p. 40). Adherence to the protective order will also make it difficult for

Rautenberg to present his case in this action (Petition, p. 14-15) and has already led to the dismissal of another related action (Petition, p. 15).

Indeed, counsel who prepared the writ petitions and related pleadings in the Court of Appeals were denied access to the order they were challenging (Petition, p. 11), and received only *censored* copies of the government's pleadings, making this proceeding to challenge the order more difficult.

The provision forbidding Petitioners from public disclosure of the order thus presents this Court with broad issues arising from the application of this Court's *Butterworth* and prior restraint doctrines to judicial protective orders, and specifically to an expansive assertion of the state secrets privilege which goes beyond the realm of evidentiary privilege to control a party's out-of-court disclosure of information not gained through discovery.

Centrally, it raises the question of whether, and under what circumstances, a district court can be allowed to collaborate with the government to immunize actions affecting the liberty and property of private individuals from public scrutiny by using protective orders to render them secret.

CONCLUSION

Secret laws are the hallmark of a tyrannical society; they are inimical to the very concept of law. See Fuller, *Positivism and Fidelity to Law*, 71 Harv.L.Rev. 630 (1958). The question here is whether the provisions of the protective order which turn it into a secret law by (1) denying full access to it for those who must abide by it, and (2) forbidding them from disclosing it to others, can be justified by the expansive claim of state secrets privilege made by the government and accepted by the district court.

This Court should grant the writ and review the case on the merits in order to explore and resolve the problems raised by this secret decree. It will thereby ensure that government by secret court decree cannot become an accepted part of our legal structure by default.

Respectfully submitted,

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